R.D. # 0002-05
Hasbrouck Heights, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

BERGEN FUNERAL SERVICE, INC.[1] Employer and **CASE 22-RC-12561** **LOCAL 813, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO** Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The Petitioner seeks to represent a unit of about 14 licensed funeral directors employed by the Employer at its Hasbrouck Heights, New Jersey facility, excluding guards, supervisors, clerical employees, professional employees and managers.[2]

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[1] This is the Employer's correct name, as stipulated by the parties at the Hearing. In its brief, the Employer stipulated that for the purpose of the bargaining unit determination, its two corporate entities Bergen Funeral Service of New Jersey, Inc. and Bergen Funeral Service of New York, Inc., are a single employer.

[2] The Employer has moved that the petition be dismissed because the Petitioner refused to proceed to an election in a unit other than the requested unit, which is different from the unit specified in the petition. While Petitioner did not formally amend its petition, I conclude that by the positions it took at hearing, Petitioner did so. I therefore shall not dismiss the petition.

The Employer also raised an argument in its brief concerning the adequacy of the showing of interest submitted in support of the petition. The sufficiency of Petitioner's showing of interest is an administrative

The Employer contends that the unit proposed by the Petitioner is inappropriate because the employees do not share a community of interest; rather, there should be separate units of funeral directors according to their licensure, that is, separate units (1) of funeral directors licensed in New York, (2) of those licensed in New Jersey and (3) of those who hold dual licenses. The Petitioner contends that two individuals, James Etheridge and Linda Merritt, are supervisors within the meaning of Section 2(11) of the Act who should therefore be excluded from the unit.

Based on the following facts and analysis, I find appropriate a single unit of all licensed funeral directors employed by the Employer. Additionally, I find that the Petitioner has not shown that Etheridge and Merritt are supervisors within the meaning of Section 2(11) of the Act. Therefore, they are also appropriately included in the unit.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[3] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[4]

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matter, not subject to litigation. *O.D. Jennings and Company*, 68 NLRB 516 (1946).

[3] A brief filed by the Employer has been considered.

[4] The Employer is a New Jersey corporation engaged in providing funeral services from its 330 Boulevard, Hasbrouck Heights, New Jersey facility.

3. The labor organization involved claims to represent certain employees of the Employer.[5]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

5. The appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act is as follows:

> **All full-time and regular part-time Licensed Funeral Directors employed by the Employer, excluding all office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act**

II. Facts

1. The Employer's Operations

The Employer provides outsourcing services to funeral homes, i.e., it removes bodies[6] from the place of death and transports and embalms them. While the Employer sometimes conducts business in the surrounding states of Pennsylvania, Delaware and Connecticut, the vast majority of its business is in New York and New Jersey. The Employer has two facilities: Hasbrouck Heights, New Jersey, from which the bulk of its employees operate; and Woodhaven, New York, from which one employee and its religious coordinator work.[7]

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[5] The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

[6] The reference to deceased individuals as bodies reflects language used by the parties at hearing.

[7] The Employer rents space at a third facility in New York, but none of its unit employees work out of that location.

2. The Employees In Question

The Employer employs licensed funeral directors to perform its services: eight employees hold State of New Jersey funeral director licenses, six hold State of New York funeral director licenses and four hold dual licenses. A New Jersey license holder can make funeral arrangements, direct funerals, embalm and transport bodies to cemeteries in New Jersey. A New York license holder can do removals, embalm, and make funeral arrangements and direct funerals in New York.

In New York, a funeral director must have a New York funeral director's license to pick up a body from a place of death. However, if a body has already been cleared for removal by the relevant authorities, anyone can pick it up. In New Jersey, anyone can pick up a body from the place of death.

To obtain a New Jersey funeral director's license, an individual needs two years of college, a two-year apprenticeship and a year in funeral directors or embalming school. To obtain a New York funeral director's license, an individual needs a high school degree, funeral directors school and a one-year apprenticeship.

The Employer's president and owner, Scott Nimmo, the only individual to testify at the hearing, manages and supervises both the Hasbrouck Heights and Woodhaven locations. With the exception of one New York-licensed funeral director, Orlando Gonzales, who is based in Woodhaven, New York, both the New York- and New Jersey-licensed funeral directors report to and are dispatched out of Hasbrouck Heights. All the funeral directors use vehicles provided by the Employer, which they either pick up at

Hasbrouck Heights or bring to their homes. Woodhaven-based funeral director Gonzales calls Hasbrouck Heights each morning for his assignments and is dispatched from there.[8]

Although some New Jersey licensees are compensated at a somewhat higher rate than New York licenses - $1300 to $1200 per week, by contrast to approximately $1000 per week - half the New Jersey licensees also receive approximately $1000 per week. The record reveals that compensation is based on a number of criteria: the amount of embalming an individual does, experience in the field, responsibility and ability. The Employer does a significant amount of embalming in New Jersey. It does very little embalming in New York.

The New York and New Jersey licensees work the same hours, often on overlapping shifts, regardless of licensure, in order to provide coverage.

New York licensed funeral directors spend 75% of their time in New York. The remaining 25% of their time is spent at the Hasbrouck Heights facility, making deliveries to New Jersey funeral homes and making removals in New Jersey. Likewise, the New Jersey licensed funeral directors spend approximately 75% of their time in New Jersey and the rest of their time in New York, delivering bodies to and administering funerals in New York. New York licensed funeral directors are dispatched to remove bodies in New Jersey and New Jersey licensed directors are dispatched to remove bodies in New York.

While New York licensed funeral directors receive paychecks from the New York incorporated business and New Jersey funeral directors receive paychecks from the New Jersey incorporated business, Nimmo’s signature is stamped on all checks.

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[8] The record reveals that Gonzales occasionally has assignments in New Jersey.

Employees with New York and New Jersey licenses have the same vacation benefits and are on the same seniority list for vacation purposes. They have the same sick leave and holidays. Funeral directors with licenses from both states share the same health insurance, although the premiums the Employer pays for the New York licensees are higher. All funeral directors work under the same system - honor - in reporting their hours.

3. Supervisory Issues - Etheridge and Merritt

Merritt and Etheridge's job duties are to pick up and transport bodies, just as other funeral directors. Nimmo is the only individual with authority to hire, fire or discipline employees; his workday lasts until 6:00 p.m. to 7:30 p.m. After he has left the facility or if he is not present at other times during the day, five individuals can decide which funeral director to dispatch and to where to send that individual. Etheridge and Merritt are two of the five individuals who perform this dispatching task. After Nimmo has left the facility in the evening, if one of the funeral directors wishes to leave work early, he or she asks Merritt for permission.

Merritt has, on 5 to 10 occasions, recommended that a funeral director be suspended or terminated by writing up an incident. On each of those occasions, Nimmo spoke with the relevant employee after receiving the report from Merritt and reduced the discipline to merely a warning in the individual's file.

Etheridge has recommend discipline for employees 6 to 12 times over his 15-year employment with the Employer. None of those individuals was suspended or terminated; rather, Nimmo considered the matter and gave the employee a warning.

Nimmo did not consult with either Merritt or Etheridge on those occasions: they played no role after the initial report. Thus, each time Merritt or Etheridge recommended discipline, Nimmo reduced what they had recommended.

III. ANALYSIS AND CONCLUSIONS

A. Community of Interest

The Employer contends that the petitioned for unit of all licensed funeral directors is not appropriate and that the unit should be divided into units dependent upon licensure. To the contrary, I find that the sought-after employees share a sufficient community of interest to warrant a finding that they comprise an appropriate unit.

It is well established that the Act requires only that a petitioner seek an appropriate unit and not the most appropriate or comprehensive unit. See *Morand Brothers Beverage Co*., 91 NLRB 409 (1950), enfd. 190 F. 2d 576 (7th Cir. 1950); *Capital Bakers*, 168 NLRB 904 (1967). In deciding on an appropriate unit, the Board first considers the union's petition and whether the unit sought is appropriate. *Overnite Transportation Company*, 322 NLRB 723 (1966). A petitioner's desire concerning the composition of the unit that it seeks to represent constitutes a relevant consideration. *Marks Oxygen Company of Alabama*, 147 NLRB 228 (1964).

In arriving at an appropriate unit determination, the Board weighs "various community of interest factors," including:

> "[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and time spent away from the employment or plant situs under State or Federal regulations; the infrequency or lack of contact, with other employees; lack of integration with work functions of other employees or interchange with them; and the history of bargaining." *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

Clearly, this is a case in which the sought-after employees share certain interests with each other, despite differing licensure. All the Employer's funeral directors share the same benefits, wages and hours. There is significant evidence of standardized control of labor and employment policies, procedures and benefits. The same individual, Nimmo, makes all decisions regarding hiring, firing and discipline and supervises all the funeral directors, both New Jersey and New York license holders. Both the New York- and New Jersey-licensed funeral directors work out of the same facility on the same shifts, thus clearly interacting at that location. New York and New Jersey funeral directors can also be dispatched to the same assignment. The record reveals that while some funeral directors may be more skilled at embalming than others, they all perform this task. Thus, all funeral directors function in providing the Employer's services of picking up, transporting and embalming bodies.

I also find evidence of substantial employee interchange involving New York licensed funeral directors and New Jersey licensed funeral directors. To that end, all funeral directors but one report to the Hasbrouck Heights facility. They all work in both New York and New Jersey and on the same overlapping shifts.

While the qualifications for a New Jersey funeral director's license are somewhat more substantial than those required for a New York license, this one criterion, by itself, is not dispositive.

Gonzalez, who works at the Woodhaven New York location, receives his work assignments and is supervised from Hasbrouck Heights; has the same benefits and salary as the other funeral directors; spends about 25% of his time working in New Jersey; works

the same hours as the other funeral directors; and participated in an apprenticeship for a New Jersey funeral director's license and expects to take the exam for a New Jersey funeral director license. Although the parties have not raised or litigated the issue of a single versus multi-location unit, I find that while Gonzalez may work out of his home or alone from the Woodhaven facility, he is actually supervised from Hasbrouck Heights and shares a sufficient community of interest with the other New York and New Jersey licensed funeral directors to be included in the unit.

In conclusion, the evidence establishes that all the New York and New Jersey licensed funeral directors, regardless of licensure locale, share a community of interest. In so finding, I particularly rely on the facts that, for at least part of the work day, these employees perform the same work in the same locations at the same times; there is frequent contact among them; they receive the same benefits and similar salaries; and they share a commonality of supervision. Accordingly, I find that the sought-after unit is appropriate and shall direct an election therein.

B. Supervisory Issues

The Petitioner, contrary to the Employer, contends that Merritt and Etheridge are supervisors within the meaning of the Act. I find that the Petitioner has not sustained its burden to show that these individuals are supervisors.

Section 2(11) of the Act defines a supervisor as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with

> the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[9]

As the Board has noted in numerous cases, the statutory indicia outlined in Section 2(11) are listed in the disjunctive; only one need exist to confer supervisory status on an individual. See, e.g., *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989); *Ohio River Co*., 303 NLRB 696, 713 (1991); *Opelika Foundry*, 281 NLRB 897, 899 (1986); *Groves Truck & Trailer*, 281 NLRB 1194, n. 1 (1986). However, mere possession of one of the statutory indicia is not sufficient to confer statutory status unless such power is exercised with independent judgment and not in a routine or clerical manner. *Hydro Conduit Corporation*, 254 NLRB 433, 437 (1981). In *Providence Hospital*, 320 NLRB 717, 725 (1996), the Board held, "In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" Id. at 724, citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)). The Supreme Court has stated: "Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of … judgment or discretion … as would warrant a finding' of supervisory status under the Act." Id. (citing *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949)).

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[9] Section 2(11) of the Act sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if they hold the authority to engage in any of the 12 listed supervisory functions; their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and their authority is exercised "in the interest of the employer." *NLRB v. Kentucky River Community Care, Inc., et al.*, 532 U.S. 706, 713 (2001).

The legislative history instructs the Board not to construe supervisory status too broadly, because an employee who is deemed a supervisor loses the protection of the Act. See *Providence Hospital, supra,* 320 NLRB at 725*; Warner Co. v. NLRB,* 365 F. 2d 435, 437 (3rd Cir. 1966), cited in *Bay Area-Los Angeles Express,* 275 NLRB 1063, 1073 (1985). The burden of proving that an individual is a statutory supervisor rests with the party asserting it. *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861, 1863 (2001). Absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quadres Environmental Co.*, 308 NLRB 101, 102 (1992) (citing *Sears Roebuck & Co.,* 304 NLRB 193 (1991)). Further, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. *The Door*, 297 NLRB 601 (1990) (quoting *Phelps Community Medical Center,* 295 NLRB 486, 490 (1989)).

The Petitioner claims that Merritt and Etheridge should be excluded as supervisors because they have the authority to discipline employees or to effectively recommend such action. However, it is clear from the record that when either Merritt or Etheridge writes up a funeral director, the process consists of their reporting the problem to Nimmo, who ultimately decides what to do. The record revealed no instance in which Merritt or Etheridge's write-ups were used as anything other than a report. See *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998) (warnings that do not affect employee's status are not evidence of supervisory authority). On these rare occasions when Merritt and Etheridge have submitted to Nimmo a written notice describing employee misconduct or a problem

at issue, Nimmo then either talked to the employee involved and investigated the matter before determining the disciplinary action to be taken or otherwise determined to change the recommended action, which he did in all cases. *Northcrest Nursing Home,* 313 491, 497 (1993) (warnings do not lead to personnel action, or if they do, action is not taken without independent investigation or review by others). Thus, even though Merritt and Etheridge have recommended suspension and discharge of funeral directors, Nimmo, after conducting his own investigations, has never levied the recommended discipline. *Michigan Masonic Home,* 332 NLRB 1409, 1410 (2000) (failure to follow recommendations regarding discipline by manager demonstrates that the recommendations are not effective); *Ten Broeck Commons,* 320 NLRB 806, 812 (1996) (reports do not automatically result in discipline, nor is the discipline, when given, a product solely of the reportorial account). I find this limited and occasional exercise of responsibility is more of a reporting than disciplinary function and is not sufficient to establish that Merritt and Etheridge are supervisors under the Act. See *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001) (to confer supervisory status, disciplinary authority must lead to personnel action without the independent investigation or review of management); *Illinois Veterans' Home*, 323 NLRB 890 (1997) (warnings merely reportorial, where delivered to manager who was responsible for deciding what, if any, disciplinary action should be taken based on his independent judgment.)

The Petitioner also contends that Merritt and Etheridge exercise sufficient authority to assign or responsibly direct employees to justify excluding them as statutory supervisors. Merritt and Etheridge, as well as three other funeral directors, make assignments to employees when Nimmo is not available. The record reveals these

assignments are routine and appear to be mere dispatching of funeral directors to a particular removal or funeral. There was no showing that Merritt and Etheridge use independent judgment to select among employees. See *Clark Machine Corp.*, 308 NLRB 555, (1992) (assignments are routine when based on employees' skills that are well known). Nor was there any evidence that it was necessary to resolve conflicts or problems with respect to the tasks to be performed or the skills or strengths of the employees. The record is devoid of evidence regarding what amount of direction Merritt and Etheridge use, if any, in the projects they assigned. Thus, I find that the Petitioner has not established that the individuals in question assign or responsibly direct employees so as to be excluded from the unit as supervisors on that basis. See *Artcraft Displays, Inc.*, 262 NLRB 1233 (1982).

Finally, the context in which Merritt and Etheridge work is suggestive of their status as employees rather than supervisors. In this regard, if Nimmo is the Employer's only supervisor, the ratio of employees to supervisor is 14 to 1 - not uncommonly high. However, if Merritt and Etheridge are found to be supervisors under the Act, as the Petitioner contends, the ratio of employees to supervisors falls to an inordinately low level of 4 1/2 to 1. See *Wilson Tree Company, Inc.*, 312 NLRB 883, 893 (1993) (supervisory ratio of 14 to 1 falls within Board parameters, while 4 to 1 ratio is inordinately low). Indeed, the evidence indicates that Merritt and Etheridge spend most of their time performing the same work that is standard among funeral directors.[10]

[10] At hearing the Petitioner adduced some evidence of secondary indicia of supervisory authority. The Board has held that it is unnecessary to consider such evidence in the absence of statutory indicia of supervisory authority. *Bozeman Deaconess Hospital*, 322 NLRB 1107 fn. 2 (1997).

Accordingly, based upon the foregoing and the record as a whole, I find that Merritt and Etheridge are not supervisors as defined by the Act and I shall include them in the petitioned-for unit.

IV. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **Local 813, International Brotherhood of Teamsters, AFL-CIO**.

V. LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility,* 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102 on or before **February 24, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **March 3, 2005**.

Signed at Newark, New Jersey this 17th day of February 2005.

/s/Gary T. Kendellen

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Gary T. Kendellen, Regional Director
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